E COURT, U. S.

FILED

AUG 14 1974

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-119

STATE OF WASHINGTON,
Petitioner,

v.

GILES S. ODOM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

BRIEF FOR PETITIONER

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Date: August 13, 1974.

PRESTIGE PRESS TACOMA, WASHINGTON

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IN THE

Supreme Court of the United States

October Term, 1974

No. .....

STATE OF WASHINGTON,
Petitioner,
v.
GILES S. ODOM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

BRIEF FOR PETITIONER

The State of Washington respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Washington filed in this matter on March 21, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals of Washington, Division Two, is reproduced in Appendix A hereto; and it is reported at 504 P.2d 1186, 8 Wn.App. 180.

The opinion of the Supreme Court of Washington, sitting *en banc*, is reproduced in Appendix B hereto; and it is reported at 520 P.2d 152, 83 Wn.2d. 541.

The order denying the state's petition for rehearing

is not reported; the remittitur reciting that action is reproduced in Appendix C hereto.

JURISDICTION

The judgment and opinion of the Supreme Court of Washington (Appendix B hereto) was entered on March 21, 1974. A timely petition for rehearing[1] was denied on May 16, 1974 (Appendix C hereto).

This petition for a Writ of Certiorari was filed within 90 days of that date, as required by this honorable court's Rule 22 (1).

This honorable court's jurisdiction is invoked under 28 U.S.C. § 1257(3) which provides that:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari * * * where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution * * * of the United States.

and both the Supreme Court of Washington (Appendix B) and the Court of Appeals of Washington, Division Two (Appendix A) had ruled upon, and upheld, the defendant-respondent's objections to the state's statute and its alleged infringement of his rights as measured by the Constitution of the United States and the decisions of this honorable court.

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[1] The state is aware of this honorable court's view that a petition for rehearing in the Supreme Court of Washington is not a condition precedent to the filing of a petition for a Writ of Certiorari in this honorable court. *Local 174 Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed 2d 593 (March 5, 1962).

QUESTION PRESENTED

May the people of the State of Washington, through their Legislature, consistently with the provisions of Amendments 2, 5, 10 and 14 of the Constitution of the United States, as part of the state's comprehensive statutory plan for the protection of the people of the state against assaults, firearms and dangerous weapons, provide:

> In the trial of a person for committing or attempting to commit a crime of violence, the fact that he was armed with a pistol and had no license to carry the same shall be prima facie evidence of his intention to commit said crime of violence.

and instruct a jury in a criminal prosecution for multiple charges of assault with firearm in accordance therewith?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved include the Second, Fifth, Tenth and Fourteenth Amendments to the Constitution of the United States.

These constitutional provisions are reprinted in Appendix D hereto.

Also involved is Art. 1, § 24 of the Constitution of the State of Washington; that provision is also reprinted in Appendix D.

The statutes of the State of Washington here involved include the following provisions of the Revised Code of Washington (RCW): 9.01.080,: 9.11.010, 9.-11.020 and 9.11.030.

Also involved are the following provisions of the Firearms and Dangerous Weapons provisions, also known as the Uniform Firearms Act — 9.41.010 through 9.41.270. All provisions are set out in Appendix E herewith.

Also set out in Appendix E are provisions of RCW 9.95.015 and 9.95.040.

STATEMENT OF THE CASE

There were about 60 employees working at the Tacoma office of the Washington State Employment Security Department, and about 100 unemployment compensation benefit claimants were also present (St. 53).[2]

Defendant, after some disagreement about his unemployment benefits (St. 54), left the building (St. 313), and came back with a 44-caliber magnum gun under his coat (St. 55, 95).

He fired this weapon at Oscar Oltmann, the Supervisor of Benefits (St. 56), and apparently missed, because the victim threw at him a hammer with which he had been repairing a drawer in a table (St. 51-52).

He fired again and hit the victim (St. 56) who fell (St. 57); and although he did not die, he was permanently paralyzed, and confined to a wheelchair, even at trial (St. 65).

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[2] As this honorable court noted in *Draper v. Washington*, 372 U.S. 487, at 490, n. 1, 83 S.Ct. 774, 9 L.Ed.2d 899, at 902-903, n. 1 (March 18, 1963), in the State of Washington, the transcription, by the court reporter, of the testimony at a court session is called the 'Statement of Facts', hereinafter indicated as 'St.'; the official record of pleadings, motions, orders and the like is called the 'Transcript' herinafter indicated as 'Tr.'

The defendant reloaded the weapon while standing over his victim (St. 57); and then said

> I am going home if they want me, if they want me they won't find me (St. 115).

He then walked out of the building (St. 89).

Outside the building, he and law enforcement officers exchanged 35 shots (St. 321); he did not hit them, nor they him.

He fired at Tacoma Police Department Officer Phillip Gainey, Count II (St. 219-222); he fired at Officer Michael Lynch, Count III (St. 206-267); he was aiming at Officer Grenvills Legge, Count IV (St. 253); App. F, Inst. No. 1, p. A-44; that officer thought the defendant was trying to kill him (St. 252); the officer knocked defendant down with the police car (St. 245); the officer jumped out of the car (St. 245). The defendant then said, "I've had enough" (St. 247); the officer, approaching from behind the defendant (St. 253), took the gun away from defendant (St. 252).

The defendant then said:

> You son of a bitch. I wish I had shot you. (St. 248).

The gun still had two unfired bullets in it (St. 247, 249), and it was still "cocked" (St. 320, 246).

He was also charged in Count V (St. 201-202) with having shot a civilian, Truman Pugh, who was some part of a city block away (St. 200-201).

The defendant had been refused a license to carry a pistol, RCW 9.41.050 and RCW 9.41.070 (App. E, p. A-32, A-33-34), because he had falsified his application, by failing to disclose (St. 287) a prior conviction of a misdemeanor of assault and resisting arrest (St. 293-325-326).

Over defendant's objection, the trial court, relying on RCW 9.41.030,[3] instructed the jury:

> You are instructed that under the laws of the State of Washington no person shall carry a pistol concealed on or about his person, except in his place of abode or place of business, without a license therefor.
>
> You are further instructed that in the trial of a person who has been charged with a crime of violence, the fact that the defendant was armed with a pistol and had no license to carry the same shall be prima facie evidence of his intention to commit such crime of violence.
>
> "Prima facie evidence" means evidence which may be accepted for proof of a particular fact. Such evidence even if not refuted by the defendant, should be given just such weight as it seems to you to merit.
> (Inst. No. 25, St. 360, App. F, p. A-49).

Defendant was convicted on Counts I, II, III and IV (Tr. 12-15).

He was found not guilty on Count V (Tr. 16).

On appeal to the Washington State Court of Ap-

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[3] RCW 9.41.030 provides:

> In the trial of a person for committing or attempting to commit a crime of violence, the fact that he was armed with a pistol and had no license to carry the same shall be prima facie evidence of his intention to commit said crime of violence.

peals, that court ruled that RCW 9.41.030 was unconstitutional (App. A, p. A-8); but that, because the evidence was so overwhelming, it affirmed the judgment and sentences as to counts I, II and III, while reversing as to Count IV, as to Officer Legge (App. A, p. A-10).

The state's petition for rehearing was denied; the state's timely petition for review in the Supreme Court of Washington was granted by that court. The results in the Court of Appeals were affirmed in all respects (App. B).

Petition for rehearing there was denied on May 16, 1974 (App. C).

Although the Supreme Court of Washington had in earlier cases validated the statute against a constitutional attack,[4] in the case at Bar, it appeared to feel that the decisions of this honorable court in *In re Winship*, and *Leary v. U.S.* and *Turner v. United States*[5] required it to declare the statute void.

And the Supreme Court of Washington appeared to conclude that the Legislature could not have found, and that the state did not independently prove, that

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[4] See: *State v. Thomas*, 58 Wn.2d 746, at 746-749, 360 P.2d 930 (*En Banco*, Sept. 14, 1961), reaffirmed in *State v. Thomas*, 63 Wn.2d 59, at 64, 385 P.2d 532 (Oct. 10, 1963); followed: *State v. Gilbert*, 3 Wn.App. 491, at hdnt. 1, and at 492, 475 P.2d 797 Court of Appeals, Division One - Panel 1, Oct. 26, 1970), petition for review denied, 73 Wn.2d 996 (Sup.Ct., Dec. 21, 1970).

[5] *In re Winship*, 397 U.S. 58, 90 S.Ct. 1068, 25 L.Ed.2d 368 (March 31, 1970).
Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (May 19, 1969).
Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (Jan. 20, 1970), rehearing denied, 397 U.S. 958, 90 S.Ct. 939, 25 L.Ed.2d 144 (Feb. 27, 1970).

there was a causal relationship between the fact that the possessor of a handgun had no license for it and that he later committed a crime of violence with it.

REASONS FOR GRANTING THE WRIT

1. The Second Amendment to the Constitution of the United States does not prohibit a state from regulating the possession and use of handguns; but the Supreme Court of Washington, for reasons not required by the views of this honorable court, has invalidated a presumption here which is an important part of the legislature's statutory scheme of such regulation.

2. The presumption which the legislature has provided by statute is permisible even when the statute reflects possibly unprovable assumptions about the relationship between the fact that a defendant is deliberately and willfully in possession of a handgun for which he does not have the required license, and that he may have *intended* the crime which he later committed with that handgun.

The state, through its legislature, and even when measured by the Second Amendment to the Constitution of the United States, as well as by Art. I, § 24 of our state constitution, has the right to regulate and license, and, indeed, in some circumstances, even to prohibit, the possession and use of some firearms. See e.g. *United States v. Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L.Ed. 1206 (May 15, 1939); *State v. Krantz*, 24 Wn.2d 350, 164 P.2d 453 (Dec. 14, 1945), rehearing denied, 24 Wn.2d 355 (Jan. 14, 1946); accord: *An-*

notation: Validity and construction of gun control laws: 28 ALR 3rd 845 (1969) and 1973 Supp.

The weapon in the case at Bar is a *mammoth* weapon — a 44-caliber magnum revolver (Exh. 42; St. 208, 251, 309).

This honorable court has ruled that any constitutional "right to bear arms" must be read in light of militia requirement of the Second Amendment. See: *United States v. Miller, supra,* where this honorable court, in approving the outlawing of a shotgun with a barrel of less than 18 inches, ruled:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense . . . (307 U.S. at 178, 83 L. Ed. at 1209).

More recently in reviewing the Federal Gun Control Act of 1968, 18 USCS § 922, this honorable court noted that

> The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background or incompetency." . . .

See: *Huddleston v. United States,* U.S. , 94 S.Ct. 1262, 39 L.Ed.2d 782, at 790 (March 26, 1974).

The legislature's licensing requirement, RCW 9.41.050 and RCW 9.41.070, Appendix E, p. A-32, A-33-

34, is also central to our statutory scheme of RCW 9.41;[6] and the rebuttable presumption in RCW 9.41.-030 is an important part of that scheme.

Our legislature is primarily a part-time citizen body, serving 60 days every two years unless otherwise convened by our governor in special session. Appendix D, p.... The presumption in RCW 9.41.030 reflects an empirical judgment by a legislature so com-

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[6] There is a wide diversity in the purpose and scope of state gun control laws.

Twenty-five states require a license to sell handguns at retail, eight require a permit (or the equivalent) to purchase a handgun, eleven require a waiting period between purchase and delivery of a handgun, 29 require a license to carry a handgun, 19 prohibit the carrying of a concealed handgun, 18 require a license to carry a handgun in a vehicle, 22 prohibit the carrying of a loaded firearm in a vehicle, and four states require the registration of firearms.

The Challenge of Crime in a Free Society, A Report by the Presidents Commission on Law Enforcement and Administration of Justice; published by the United States Government Printing Office, Washington, D.C., February, 1967 (Page 240).

The Commission also recommended:

Each State should require a person to obtain a permit before he can either possess or carry a handgun. Through licensing provisions, Federal law should prohibit mail order and other interstate sales of handguns and should regulate such sales of rifles and shotguns

Also from :*The Challenge of Crime in a Free Society*, A Report by the President's Commission on Law Enforcement and Administration of Justice; published by the United States Government Printing Office, Washington, D.C., February, 1967 (Page 243).

posed;[7] this honorable court has, of course, noted that the process of determining the rationality of the connection between a fact proved, and an ultimate fact is

> . . . by its nature, highly empirical, and in matters not within the specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and call conclusions from it.

See: *Leary v. United States*, 395 U.S. 6, at 35, 89 S.Ct. 1532, 23 L.Ed.2d 57, at 81 (May 19, 1968)[8]

Accordingly this honorable court's views in *In re Winship*, *Leary* and *Turner*, on which the Supreme Court of Washington relied, should be read in light of this honorable court's most recent views in *Cupp v. Naughten*, U.S. , 94 S.Ct. 396, 38 L.Ed.2d 368 (Dec. 4, 1973).

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[7] The Supreme Court of Washington noted the state's statistics, Appendix B., p. A-20-21, which had been furnished to that court.

Homicides in Tacoma,* Washington

Year	Number of Homicides	Number of which were committed by gun	Number of which perpetrator *lacked* license	Number of which perpetrator *had* license
1971	10	7	6	1
1972	12	6	6	0
1973 to date	9	6	3	**2

* Tacoma is the city in which the crime at Bar took place; it is the third largest city of the state, and the county seat of the second largest county in the state.

** One more was a law enforcement officer authorized to carry a gun.

Source: Survey by Captain M.E. Snyder, in charge of Records and Identification Division, Tacoma Police Department.

[8] Oliver Wendell Holmes noted:

> The life of the law is not logic; but it is experience.
>
> (The Common Law, p. 1)

That case involved a prosecution for robbery, and as here, for an assault.

The specific instruction to the jury which was challenged there dealt with the presumption, in Oregon, that "every witness is presumed to speak the truth."

That instruction could *only* apply to the witnesses for the state because (unlike the case at Bar) the defendant had neither called witnesses nor had taken the stand himself. (38 L.Ed.2d at 376).

As in the case at Bar, the trial court had instructed the jury that

(1) defendant was presumed innocent until proved guilty beyond a reasonable doubt. (38 L.Ed.2d at 375; cf. our Inst. No. 3, 4, St. 347-348; App. F, p. A-45).

(2) The state had the duty to prove defendant's guilt "beyond a reasonable doubt"; (38 L.Ed.2d at 376; cf. our Inst. No. 3, St. 347, App. F, p. A-45), and the term "reasonable doubt" was then defined in detail (38 L.Ed. 2d at 371; cf. our Instr. No. 5, St. 348, App. F, p. A-45).

(3) The jury could consider "the manner of the witness, the nature of the testimony, and any other matter relating to the witness' possible motivation to speak falsely" (38 L.Ed.2d at 375-376; cf. our Inst. No. 32, St. 365, App. F, p. A-50).

The Supreme Court of the United States ruled that it was *proper* for the trial court to instruct the jury that "every witness is presumed to speak the truth", even when the *only witnesses* in the case were witnesses for the state.

This honorable court ruled:

. . . a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction.

(38 L.Ed.2d at 373).

* * * *

. . . the well established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.

(38 L.Ed.2d at 373)

* * * *

. . . the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.

(38 L.Ed.2d at 373)

* * * *

Certainly the instruction by its language neither shifts the burden of proof nor negates the presumption of innocence accorded under Oregon law. It would be possible perhaps as a matter of abstract logic to contend that any instruction suggesting that the jury should believe the testimony of a witness might in some tangential respect "impinge" upon the right of the defendant to have his guilt proved beyond a reasonable doubt. But every instruction bearing on the burden of proof, just as those bearing on the weight to be accorded different types of testimony and other familiar subjects of jury instructions, are in one way or another designed to get the jury off dead center and to give it some guidance by which to evaluate the frequently confusing and conflicting testimony which it has heard. The well recognized

and long established function of the trial judge to assist the jury by such instructions is not emasculated by such abstract and conjectural emanations from Winship..

(38 L.Ed.2d at 373)

The presumption in the statute is one which is constitutionally permissible even though it might be based upon unprovable assumptions.

The views of this honorable court in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 93 S.Ct. 2628, 37 L. Ed. 2d 446 (June 21, 1973), rehearing denied, 414 U.S. 881, 94 S.Ct. 27, 38 L.Ed.2d 128 (Oct. 9, 1973) are most instructive.

There this honorable court noted:

> But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, any kind of state regulation is "impermissible." We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself.
>
> (413 U.S. at 60, 37 L.Ed.2d at 458; footnote omitted.)
>
> * * * *
>
> Although there is no conclusive proof of a connection between anti-social behavior and obscene material, the legislature of Georgia could quite *reasonably* determine that such a connection does or *might exist.*
>
> (413 U.S. at 61; 37 L.Ed.2d at 459; emphasis supplied.)
>
> From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie

> much lawful state regulation of commercial and business affairs.
> . . . [citing cases] . . .
> The same is true of the federal securities and antitrust laws and a host of federal regulations.
> . . . [citing cases] . . .
> (413 U.S. at 61, 37 L.Ed2d at 459).

After comprehensively cataloging a wide range of other "imponderables", this honorable court added

> The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.
> (413 U.S. at 62, 37 L.Ed.2d at 460.)

And this honorable court then concluded

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. *Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.*
> (413 U.S. at 63, 37 L.Ed.2d at 460; emphasis supplied.)

CONCLUSION

For the reasons set out above, the State of Washington, as petitioner, respectfully urges this honorable court to grant its petition and to issue the writ to review the judgment and opinion of the Supreme Court of Washington.

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Pierce County, Washington,
Counsel of Record for the
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Date: August 13, 1974.

APPENDIX A

(Opinion of the Court of Appeals of Washington, Division Two).

Reported: 504 P2d 1186, 8 Wn.App. 180

COURT OF APPEALS OF WASHINGTON, DIVISION 2

THE STATE OF WASHINGTON, *Respondent*, *v.* GILES S. ODOM, *Appellant*.

No. 467-II

Jan. 2, 1973.

Defendant was charged with first-degree assault and was convicted on four counts in the Superior Court, Pierce County, Robert A. Jacques, J. Defendant appealed. The Court of Appeals, Petrie, C.J., held that where specific intent to kill was a necessary element of the offense, it was improper to give the jury an instruction on the statutory presumption of "intent to commit the offense" from the carrying of an unlicensed pistol. The Court also held, however, that in view of evidence showing that defendant pointed and discharged his pistol at other persons, directly tending to prove defendant's intent to kill, the instruction on the statutory presumption was not prejudicial except as to the count based on defendant's pointing the pistol at a police officer without discharging it.

Affirmed as to first three counts; reversed as to count four, and remanded for new trial.

Specific intent to kill is necessary element of first-degree assault.

Specific intent to kill, as necessary element to support conviction of first-degree assault, is rarely proved by direct evidence and may be properly inferred from all circumstances.

In prosecution for first-degree assault jury could find specific intent to kill where defendant fired his

pistol at and toward other persons. RCWA 9.41.030.

In prosecution for first-degree assault, jury could find that defendant has specific intent to kill, though defendant merely pointed gun at police officer and did not fire it. RCWA 9.41.030.

Where specific intent to kill was necessary element of offense, i.e. first-degree assault, it was improper to give jury instruction on statutory presumption of "intent to commit the offense" from carrying of unlicensed pistol. RCWA 9.41.030.

Where jurors are instructed on statutory presumption of intent to commit offense, they should be further instructed that presumption is not binding even though fact to be presumed is unrefuted, and that state still has burden of proving guilt beyond reasonable doubt. RCWA 9.41.030.

Defendant charged with crime is constitutionally entitled to fair trial, but not necessarily to perfect one.

When record discloses error in instruction given on behalf of party in whose favor verdict was returned, error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless.

In view of evidence showing that defendant pointed and discharged pistol at other persons, directly tending to prove defendant's intent to kill, instruction on statutory presumption of "intent to commit the offense" from carrying of unlicensed pistol was not prejudicial except as to count based on pointing pistol at officer without firing it; as to such count the instruction was prejudicial. RCWA 9.41.030.

Joseph Q. Betzendorfer, Jr., of Betzendorfer & Deutscher, Richard I. Gustafson, of Sterbick, Manza, Moceri, Gustafson & Narigi, Tacoma, Court-appointed for appellant.

Joseph D. Mladinov, Sp. Counsel to Pros. Atty.

Pierce County, Tacoma (Ronald L. Hendry, Pros. Atty., Tacoma, with him on the brief) for respondent.

PETRIE, Chief Judge.

The defendant's appeal from a judgment and sentence entered subsequent to jury verdicts of guilty on four counts of first degree assault raises two issues: (1) Was there sufficient evidence to support a necessary element of the crimes charged—that the assaults were committed "with intent to kill" the alleged victim in each of the four counts; and (2) Should the trial court have instructed the jury — particularly in the manner in which it did — on the statutory presumption which flows from the fact that a defendant charged with a crime of violence was armed with a pistol and had no license to carry the same?

A challenge to the sufficiency of the evidence or a motion having that effect admits the truth of the evidence of the party against whom the challenge or motion is made and all inferences that reasonably can be drawn from such evidence, and requires that the evidence be interpreted most strongly against the challenger or movant party and in the light most favorable to the opposing party. *State v. Palmer*, 1 Wash. App. 152, 459 P.2d 812 (1969); *State v. McDaniels*, 30 Wash. 2d 76, 190 P.2d 705 (1948).

Based on the record, the jury could well have determined that on November 24, 1970, the defendant went to the Tacoma offices of the Department of Employment Security to make his weekly report in support of his application for unemployment compensation benefits. While there, he objected to filling out a particular form and to reporting to the adjudication section. After having been told by the supervisor of benefits to complete the form and return with it the next week, and after having expressed his dissatisfaction with that procedure in an angry fashion, he left the office only to return within a half hour. Upon his return, he approached the supervisor's desk, declared that he was tired of being pushed around, and an-

nounced an intention to settle this matter once and for all. All that time he was carrying a holstered .44 caliber magnum pistol in his left hand. He grasped the pistol in his right hand, pointed it at the supervistor and fired twice. On one occasion the projectile pierced through the supervisor's left lower chest, exiting to the right of the lumbar area of the spine. As a result of this gunshot wound, the supervisor suffered permanent paralysis of both lower extremities together with other permanent and incapacitating internal injuries.

After firing the pistol, he reloaded it, left the office by a rear exit and returned to his automobile in a nearby alley. In the meantime, police had been summoned. Two patrolmen approached in a "paddy wagon" and noticed the defendant sitting in his vehicle. The patrolman driver emerged from the police vehicle and the defendant fired at him. The patrolman returned the fire, and the defendant then fired at and into the windshield of the "paddy wagon" while the other patrolman was still sitting in the front seat. After a brief exchange of gunfire during which no one appears to have been hit by a projectile, the defendant ran down the alley and into another street, reloading his pistol as he ran.

At this point, a police lieutenant, driving a police prowl car, approached the defendant. The defendant pointed his pistol toward the windshield of the prowl car, but apparently did not fire the weapon. When the prowl car was approximately 25 feet from the defendant, the police lieutenant saw the gun pointed in his direction, and he believed Odom "was trying to kill me." He accelerated the vehicle and ran into the defendant, knocking him over and leaving him momentarily in a dazed condition. The lieutenant jumped out of the police car, approached the defendant from behind, and took the pistol from him. At that time the pistol was in the cocked position and was still loaded with two live rounds of ammunition. Before the gun was taken from the defendant, he said,

"I've had enough," and after having been relieved of the gun, he addressed the lieutenant, "You son of a bitch, I wish I had shot you."

Mr. Odom purchased the gun in 1969. He applied for a permit to carry the weapon while he was working alone late at night in a drive-in restaurant. His application was denied.

The defendant was arrested and subsequently was charged with having committed four counts of first degree assault — each count alleging a separate victim which he had assaulted "with intent to kill." The victims were — the supervisor of benefits, the two patrolmen who had been in the "paddy wagon," and the lieutenant who had been in the prowl car.

[1-3] The assault was undoubtedly established in each instance. The only possibly debatable question is whether or not the defendant had formed the requisite specific intent to kill each victim. The specific intent to kill, necessary to support a conviction of first degree assault, is rarely proved by direct evidence. It may be properly inferred from all the circumstances. *State v. Shelton*, 71 Wash.2d. 838, 431 P.2d 201 (1967). From all the facts and circumstances surrounding the events of November 24, 1970, an unprejudiced, thinking mind could well conclude beyond a reasonable doubt that Mr. Odom had formed a specific intent to kill the supervisor of benefits and the two patrolmen who had been in the "paddy wagon" when he fired the pistol at and toward them. The jury was warranted, therefore, in finding the element of specific intent to kill present in each of the three counts involving those 3 individuals.

With regard to count 4 — the count in which the police lieutenant was the alleged victim — the jury was faced with a slightly different problem. There is no evidence that Mr. Odom fired the weapon at or toward the lieutenant. The defendant contends, therefore, that at most he could only be convicted of second degree assault on that count. In support of that contention, he directs our attention to an expres-

sion in *Benedict v. Board of Police Pension Fund Comm'rs of Seattle,* 35 Wash.2d 465, 473, 214 P.2d 171, 176 (1950), "By pointing a loaded revolver at his father, Richard Benedict was committing the crime of assault in the second degree, . . . " The expression in *Benedict* in no way supports the defendant's contention that first degree assault with a firearm can only be committed by firing—and not merely by pointing—the weapon.

[4] The assault upon the lieutenant occurred when Mr. Odom pointed the weapon at the officer. *State v. Miller,* 71 Wash.2d 143, 426 P.2d 986 (1967). The specific intent to kill, necessary to elevate the degree of the assault from second to first may be inferred or gathered from outward manifestations by the words or acts of the party entertaining them, and from the facts or circumstances surrounding or attendant upon the act performed. The jury was so instructed. Whether (1) the defendant formed the intent to kill and failed to carry it into execution because of the brevity of the continuation of the assault, or (2) the defendant never did form any specifiic intent to kill the lieutenant, was a fact resolvable within the capabilities of the jury in view of all the surrounding circumstances. By their verdict they did resolve that fact against the defendant beyond a reasonable doubt. We cannot say that there were insufficient facts and circumstances demonstrated in the record to support the jury's verdict. Accordingly, the trial court properly denied the defendant's motion in arrest of judgment.

The failure of the defendant to pull the trigger was a circumstance tending to negate a specific intent, but was not in and of itself conclusive of a lack of specific intent to kill. Incidentally, one of the other circumstances — relied upon by the prosecution as tending to establish the intent to commit the crime charged — was the fact that at the time of the assault the defendant was armed with a pistol and had no license to carry the same. This brings us to the second major issue in this appeal.

[5] The defendant has assigned error to the giving of instruction 25 as follows:

> You are instructed that under the laws of the State of Washington no person shall carry a pistol concealed on or about his person, except in his place of abode or place of business, without a license therefor.
>
> You are further instructed that in the trial of a person who has been charged with a crime of violence, the fact that the defendant was armed with a pistol and had no license to carry the same shall be prima facie evidence of his intention to commit such crime of violence.
>
> "Prima facie evidence" means evidence which may be accepted for proof of a particular fact. Such evidence even if not refuted by the defendant, should be given just such weight as it seems to you to merit.

The defendant's contention with regard to this instruction is twofold: (1) the constitutionality of the statute upon which the instruction is founded should be reviewed in the light of a recent decision of the United States Supreme Court. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); and (2) the instruction does not adequately explain or limit the use and mandate of the statutory presumption.

Instruction 25 was based upon the statutory presumption contained in RCW 9.41.030.[1] The defendant recognizes that the constitutionality of that statute has previously been established definitively in *State v. Person*, 56 Wash.2d 283, 352 P.2d 189 (1960) and — as applied to a conviction of first degree assault — in *State v. Thomas*, 58 Wash.2d 746, 364 P.2d 930 (1961). He contends, however, that more recent opinions of the United States Supreme Court require application

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[1] RCW 9.41.030 states: "In the trial of a person for committing or attempting to commit a crime of violence, the fact that he was armed with a pistol and had no license to carry the same shall be prima facie evidence of his intention to commit said crime of violence."

of a federal test of rationality between the fact proved and the fact presumed to support the constitutionality of statutes which permit factual presumptions to flow after proof of other facts. We agree; our only real concern is whether or not the federal test imposes a more stringent requirement than hitherto has been required.

We have previously indicated a necessity to apply the federal test of rationality. *State v. Finister*, 5 Wash.App. 44, 486 P.2d 114 (1971). That test, as enunciated in *Leary v. United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), requires

> that a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

In the case at bench, we are asked to declare that it can be said with substantial assurance that the presumed fact — a specific intent to kill — will, more likely than not, flow from the established fact that at the time of the commission of the offense, the defendant was armed with an unlicensed pistol. There are no empirical data in the record toward which we can point in support of such an assurance. Neither can we find such substantial assurance from our own experience, even giving due deference to the legislative wisdom and expertise in this area. *State v. Davis*, 72 Wash. 261, 130 P. 95 (1913).

We conclude, therefore, insofar as the jury was permitted to infer a specific intent to kill either of the victims, *solely* from the fact the defendant was armed with an unlicensed pistol, instruction 25 was erroneously presented to the jury. Lest there be any misunderstanding of our holding, we do not declare that the statutory presumption may not be utilized where the defendant is charged with a crime of violence when a specific intent is not a necessary element of the crime charged.

[6] Because of our conclusion, we need not determine whether the instruction failed to fully explain to the jury the weight — or lack of weight — which it could grant to such a presumption. We do declare, however, that prudence, if not strict necessity, would dictate that one additional statement should have been added to the instruction. What was said in 1960 in *State v. Person, supra,* 56 Wash.2d at 288, 352 P.2d at 192 is still valid today:

> However, in the event that such an instruction should be requested and given in the future, we think the jury should be further instructed that the presumption is not binding upon the jury even though the fact to be presumed is unrefuted by the defendant, and that the state must still sustain the burden of proving the defendant's guilt beyond a reasonable doubt. In other words, it should be made clear that the statutory presumption permits, but in no way directs, the jury to convict the accused, and must be considered by the jury in the light of the presumption of innocence which arises upon a plea of not guilty and accompanies the accused throughout the trial until overcome by evidence which convinces the jury of the accused's guilt beyond a reasonable doubt.

[7, 8] Although we have determined that an erroneous instruction was presented to the jury, we do not conclude that the defendant is entitled to receive a new trial as to all of the counts with which he has been charged. A defendant charged with a crime is constitutionally entitled to a fair trial, but not necessarily a perfect trial. *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless. *State v. Britton,* 27 Wash.2d 336, 178 P.2d 341 (1947); *State v. Johnson,* 1 Wash.App. 553, 463, P.2d 205 (1969).

[9] Can it be said that instruction 25, insofar as

it indirectly permitted an inference of a specific intent to kill, influenced the jury? With regard to the first three counts of the information, at least, we think not. The defendant's actions speak so loudly and clearly that we can unequivocally say, as to counts 1, 2 and 3, the minds of an average jury would not have found the prosecution's case significantly less persuasive had the instruction been presented to the jury in a more restrictive form and had the jury been admonished not to utilize the statutory presumption as a basis to find in the defendant a specific intent to kill the alleged victims. The error in the instruction was, therefore, harmless error. *Schneble v. Florida,* 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972). We are not so persuaded with regard to count 4 — the count in which the police lieutenant was the alleged victim.

Accordingly, we affirm the judgment as to counts 1, 2 and 3; as to count 4, the judgment is reversed and remanded for new trial.

ARMSTRONG and PEARSON, JJ, concur.

APPENDIX B

(Opinion of the Supreme Court of Washington)
Reported: 520 P2d 152, 83 Wash.2d 541.

83 Wash.2d 541

THE STATE OF WASHINGTON, *Petitioner*, v.
GILES S. ODOM, *Respondent*.

No. 42755

Supreme Court of Washington, En Banc.

March 21, 1974.

Defendant was convicted on four counts of first-degree assault in the Superior Court, Pierce County, Robert A. Jacques, J., and he appealed. The Court of Appeals, 8 Wash.App. 180, 504 P.2d 1186, reversed defendant's conviction on one count, and the state appealed. The Supreme Court, Utter, J., held that (1) statutory presumption that when a defendant is charged with a crime of violence and is armed with an unlicensed pistol, it is prima facie evidence of his intent to commit such crime of violence is constitutionally invalid, and (2) the jury was entitled to find an intent to kill from the fact that defendant fired at the victims in the first three counts and, accordingly, although court erred in instructing on the statutory presumption, the error was harmless under the circumstances; but, the error was not harmless in respect to the fourth count, which involved no shooting at the intended victim.

Judgment of the Superior Court affirmed as to counts 1-3 and reversed and remanded for new trial as to count 4.

Stafford, J., concurred in part and concurred in the result in part with an opinion in which Brachtenbach, J., concurred.

Hale, C.J., concurred in part and dissented in part with an opinion in which Hamilton, J., concurred.

Statutory criminal presumptions establish a prima

facie case for the prosecution by allowing, but not requiring, the jury to infer presumed fact from proof of operative facts.

In respect to statutory presumption that when a defendant is charged with a crime of violence and is armed with an unlicensed pistol, it is prima facie evidence of his intent to commit such crime of violence, the evidentiary effect of the presumption is that once the operative facts are proved and the presumption attaches, the case must go to the jury and there can be no directed verdict of acquittal. RCWA 9.41.030.

Defendant is presumed innocent until proven guilty.

Guilt of an accused must be proved by competent evidence beyond a reasonable doubt. RCWA 10.58.020.

Presumption that a defendant is innocent until proven guilty stresses that the jury is to consider in the material for their belief nothing but the evidence i.e., no surmises based on the present situation of the defendant.

Statutory presumption that when a defendant is charged with a crime of violence and is armed with an unlicensed pistol, it is prima facie evidence of his intent to commit such crime of violence is constitutionally invalid, as there was no showing beyond a reasonable doubt of a rational relation to the presumed fact from the proved fact, that is, it was not shown beyond a reasonable doubt that the fact that the accused was armed with an unlicensed pistol proved his intent to commit the crime of violence with which he was charged. RCWA 9.41.030.

Legislatures have the authority to create presumptions where the presumed fact follows beyond a reasonable doubt from the proved fact.

In prosecution on four counts of first-degree assault, jury was entitled to find an intent to kill from the fact that defendant fired at the victims in the first three counts and, accordingly, although court erred in instructing on the statutory presumption that when a

defendant is charged with a crime of violence and is armed with an unlicensed pistol, it is prima facie evidence of his intent to commit such crime of violence, the error was harmless under the circumstances; but, the error was not harmless in respect to the fourth count, which involved no shooting at the intended victim. RCWA 9.41.030.

Joseph D. Mladinov, Sp. Counsel to Pros. Atty., for Pierce County, Tacoma (Ronald L. Hendry, Pros. Atty., Tacoma, with him on the brief), for the State.

Betzendorfer & Deutscher, Joseph Q. Betzzendorfer, Jr., Sterbick, Manza, Moceri, Gustafson & Narigi, Richard I. Gustafson, Tacoma, for respondent.

UTTER, Associate Justice.

The state appeals from a judgment of the Court of Appeals reversing the defendant's conviction on one count of first-degree assault. That opinion in 8 Wash.App 180, 504 P.2d 1186 (1973), affirmed the defendant's conviction on three other counts of first-degree assault. We affirm the judgment of the Court of Appeals and adopt their reasoning on the issue whether there was sufficient evidence that three of the four counts of assault were committed "with intent to kill" the alleged victims.

The remaining issue, which requires further discussion, deals with the constitutional validity of the statutory presumption that when a defendant is charged with a crime of violence and is armed with an unlicensed pistol, it is prima facie evidence of his intent to commit such a crime of violence.

The necessary facts from which the jury could have determined the guilt of the defendant, as set forth in the Court of Appeals opinion, are:

[O]n November 24, 1970, the defendant went to the Tacoma offices of the Department of Employment Security to make his weekly report in support of his application for unemployment compensation benefits. While there, he objected to filling out a particular

form and to reporting to the adjudication section. After being told by the supervisor of benefits to complete the form and return with it the next week, and after having expressed his dissatisfaction with that procedure in an angry fashion, he left the office only to return within a half hour. Upon his return, he approached the supervisor's desk, declared that he was tired of being pushed around, and announced an intention to settle this matter once and for all. At that time he was carrying a holstered .44 caliber magnum pistol in his left hand. He grasped the pistol in his right hand, pointed it at the supervisor and fired twice. On one occasion the projectile pierced through the supervisor's left lower chest, exiting to the right of the lumbar area of the spine. As a result of this gunshot wound, the supervisor suffered permanent paralysis of both lower extremities together with other permanent and incapacitating internal injuries.

After firing the pistol, he reloaded it, left the office by a rear exit and returned to his automobile in a nearby alley. In the meantime, police had been summoned. Two patrolmen approached in a "paddy wagon" and noticed the defendant sitting in his vehicle. The patrolman driver emerged from the police vehicle and the defendant fired at him. The patrolman returned the fire, and the defendant then fired at and into the windshield of the "paddy wagon" while the other patrolman was still sitting in the front seat. After a brief exchange of gunfire during which no one appears to have been hit by a projectile, the defendant ran down the alley and into another street, reloading his pistol as he ran.

At this point, a police lieutenant, driving a police prowl car, approached the defendant. The defendant pointed his pistol toward the windshield of the prowl car, but apparently did not fire the weapon. When the prowl car was approximately 25 feet from the defendant, the police lieutenant saw the gun pointed in his direction, and he believed Odom "was trying to kill me." He accelerated the vehicle and ran into the defendant, knocking him over and leaving him mo-

mentarily in a dazed condition. The lieutenant jumped out of the police car, approached the defendant from behind, and took the pistol from him. At that time the pistol was in a cocked position and was still loaded with two live rounds of ammunition. Before the gun was taken from the defendant, he said, "I've had enough," and after having been relieved of the gun, he addressed the lieutenant, "You son of a bitch, I wish I had shot you."

Mr. Odom purchased the gun in 1969. He applied for a permit to carry the weapon while he was working alone late at night in a drive-in restaurant. His application was denied.

The defendant was arrested and subsequently was charged with having committed four counts of first-degree assault — each count alleging a separate victim which he had assaulted "with intent to kill". The victims were — the supervisor of benefits, the two patrolmen who had been in the "paddy wagon", and the lieutenant who had been in the prowl car. The defendant assigned error to the giving of instruction No. 25, which reads:

> You are instructed that under the laws of the State of Washington no person shall carry a pistol concealed on or about his person, except in his place of abode or place of business, without a license therefor.
>
> You are further instructed that in the trial of a person who has been charged with a crime of violence, the fact that the defendant was armed with a pistol and had no license to carry the same shall be prima facie evidence of his intention to commit such crime of violence.
>
> "Prima facie evidence" means evidence which may be accepted for proof of a particular fact. Such evidence even if not refuted by the defendant, should be given just such weight as it seems to you to merit.

He contends that the statute upon which this in-

struction is based deprives him of his presumption of innocence and allows the jury to convict him on proof of guilt less than beyond a reasonable doubt. RCW 9.41.030 provides:

> In the trial of a person for committing or attempting to commit a crime of violence, the fact that he was armed with a pistol and had no license to carry the same shall be prima facie evidence of his intention to commit said crime of violence.

It is further urged that even if the statutory presumption is valid, the instruction improperly extends the use the jury may make of it.

[1] The constitutionality of the statute in question has been affirmed in *State v. Person*, 56 Wash.2d 283, 352 P.2d 189 (1960), and in *State v. Thomas*, 58 Wash.2d 746, 364 P.2d 930 (1961) as applied to first-degree assault. Statutory criminal presumptions in Washington have established a prima facie case for the prosecution by allowing, but not requiring, the jury to infer the presumed fact from proof of the operative facts. *State v. Person, supra*, 56 Wash.2d at 288, 352 P.2d at 193. There we stated:

> the statutory presumption permits, but in no way directs, the jury to convict the accused, and must be considered by the jury in the light of the presumption of innocence which arises upon a plea of not guilty and accompanies the accused throughout the trial until overcome by evidence which convinces the jury of the accused's guilt beyond a reasonable doubt.

As for the statute in this case, we held in *State v. Thomas, supra*, 58 Wash.2d at page 748, 364 P.2d at page 932, that

> the statute does not make the possession of a pistol without a license evidence of the commission of crime, but evidence of intent. This inference of intent is, of course, rebuttable; but, more important, it is not conclusive even if no attempt is made to rebut it. It is sufficient evidence

to take the case to the jury on the issue of intent, but the jury is not obligated to attach any weight to it. It considers it for what it may be worth.

[2] The evidentiary effect of this presumption is that once the operative facts are proved and that presumption attaches, the case must go to the jury and there can be no directed verdict of acquittal.

Subsequent to our decisions in *Person* and *Thomas*, the United States Supreme Court expanded its development of the "rational connection" test. The previous test, stated in *Thomas*, 58 Wash.2d at page 747, 364 P.2d at page 931, was that "the fact proved must bear a rational connection to the ultimate fact presumed." We there required that our experience demonstrate that the fact presumed is usually and probably coexistent with the fact from which the presumption flows.

Substantial changes in the law have occurred since these opinions, which force a reexamination of our position taken in them and the other cases based upon them.

[3-5] Two theories, closely related, apply to the administration of the criminal laws of this state. The defendant is presumed innocent until proven guilty and his guilt must be proved by competent evidence beyond a reasonable doubt. RCW 10.58.020; *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The presumption of innocence stresses that the jury is to consider in the material for their belief "*nothing but the evidence, i.e.*, no surmises based on the present situation of the accused." 9 J. Wigmore, Evidence, § 2511 at 407 (3d ed. 1940). The requirement of proof beyond a reasonable doubt has not only common law and statutory origins but also has been recently given constitutional statute in *Winship*, where the court stated, at page 364 of 397 U.S., at page 1073 of 90 S.Ct.: "we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

which he is charged." The court described the reasonable doubt standard as a "prime instrument for reducing the risk of convictions resting on factual error." Its role in criminal prosecution was recognized as vital to an accused because "he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." The fact that in litigation there is always a margin of error was conceded by the court, and in recognition of this they held the reasonable doubt standard indispensible because it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." 397 U.S. at 363, 364, 90 S. Ct. at 1072.

The apparent inconsistency between the newly emphasized standard of proof beyond a reasonable doubt and criminal presumptions has troubled many writers. Ashford & Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: Theoretical Overview, 79 Yale L.J. 165 (1969); Note, The Unconstitutionality of Statutory Criminal Presumptions, 22 Stan. L.Rev. 341 (1970); Christie & Pye, Presumptions and Assumptions in the Criminal Law: Another View, Duke L.J. 919 (1970); Fuller & Ulrich, An Analysis of the Constitutionality of Statutory Presumptions That Lessen the Burden of the Prosecution: 25 U.Miami L.Rev. 420 (1971); Holland & Chamberlin, Statutory Criminal Presumptions: Proof Beyond a Reasonable Doubt?, 7 Val. U.L. Rev. 147 (1973). The United States Supreme Court recently has, as well, reevaluated its earlier approach to the validity of criminal presumptions in *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969) and *Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970).

In *Leary*, a presumption that one knew marijuana had been illegally imported from proof of its possession was struck down as failing the rational connection test. The court held, at page 45 of 395 U.S., at page 1553 of 89 S. Ct., that "it was incumbent upon the prosecution to demonstrate that the inference was permissible before the burden of coming forward

could be placed upon the defendant." The court required that it should "at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S. at 36, 89 S.Ct. at 1548.

The court also indicated an even stricter standard might be applied, at page 36, footnote 64, at page 1548 of 89 S. Ct., where it stated that inasmuch as the presumption was unconstitutional under the more-likely-than-not standard "we need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use."

In a later case, the court in *Turner,* 396 U.S. at page 416, 90 S. Ct. 642, sustained a presumption which inferred knowledge of the unlawful importation of heroin from its unexplained possession by stating that it met both the more-than-likely-than not standard and the reasonable doubt test. The court likewise invalidated the same presumption as applied to cocaine, stating that it could not be sustained even under the "more-likely-than-not standard". Subsequent to *Leary* and *Turner,* many courts which have recognized the problem, have concluded that the beyond a reasonable doubt test must be applied to find the rational relation to the presumed fact from the proved fact.

In *United States v. Johnson,* 140 U.S. App.D.C. 54, 433F.2d 1160, 1168 (1970), the court indicated that

> because proof beyond a reasonable doubt is itself an indispensible ingredient of due process in criminal cases, a rule of inference "which passes muster when so judged [by the more-likely-than-not standard] must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use." This latter, in such circumstances, imposes in turn the requirement that the inference authorized, standing alone, possess such po-

tency that a jury could prudently accept it as proof of guilt to a moral certainty.

(Footnotes omitted.) In footnote 60, page 1168, it states: "This is but the normal judicial standard by which the trial judge appraises the sufficiency of the evidence to determine whether the case should be submitted to the jury . . . "

In *Wilbur v. Mullaney*, 473 F.2d 943, 948 (1st Cir. 1973), the court struck down a presumption that malice is presumed from an intentional killing, noting, that while a presumption "might, conceivably, be justified if based upon a fact which, if found beyond a reasonable doubt, also compels the inference beyond a reasonable doubt . . . no one could suggest such in this case."

The application by the United States Supreme Court of the beyond a reasonable doubt standard as an alternative in *Leary* and *Turner*, and its subsequent application in *Johnson* and *Wilbur*, are persuasive to us that this is the appropriate standard to apply in this case.

[6] The answer to whether it has been shown beyond a reasonable doubt in this case that the fact the defendant was armed with an unlicensed pistol proves his intent to commit a crime of violence can only be no. The facts in this case amply illustrate the failure of proof on this issue. The defendant purchased the gun two years before the crime was committed. He applied for a license, which was denied. He believed at that time that he needed the gun for self-protection while working as a night-time janitor. The failure to license a gun, standing alone, hardly can be said to create an inference beyond a reasonable doubt of an intent to commit a crime of violence with that gun two years after the gun's purchase.

The prosecutor has presented, in his brief, statistics showing that of seven homicides by gun in 1971, six were with unlicensed guns; in 1972 that six homicides were by gun, all of them unlicensed and that to date in

1973, six homicides have been committed by gun with three of the guns unlicensed. These figures, while of interest, fail to show the necessary correlation between the proved fact and the presumed fact beyond a reasonable doubt and only serve to demonstrate the unsatisfactory methods which we use in dealing with the use of presumptions and problems of proof relative to them in criminal law.

In determining whether a requisite level of certainty exists, appellate courts depart from the traditional manner of proof in criminal cases. This introduces another area of uncertainty in the use of presumptions. The manner in which testimony is considered to determine the factual basis of presumption varies. In *State v. Thomas, supra*, the court looked to its own experience and legislative experience. In *Turner v. United States, supra*, the footnotes indicate many sources for expert testimony considered as evidence of the factual basis of presumptions. Among those sources were senate subcommittee hearings, presidential reports and reports from the Bureau of Narcotics. The testimony is considered by the court at the appellate level from briefs without cross-examination of its source. There is no opportunity to present defense witnesses to challenge the statistics' validity or for compulsory process to produce witnesses regarding the validity of the presumption. The standards, if any, for admission of this evidence for consideration is patently less stringent than for that introduced at a criminal trial.

The application of the beyond a reasonable doubt test to establish the rational connection still does not solve the problems associated with the use of presumptions. The law still requires us, at the appellate level, on the basis of inadequate data, to determine the validity of inferences better resolved at the trial level by the trier of fact.

Justice Black, in his dissent in *Turner*, at pages 428, 431 of 396 U.S., at pages 658, 660 of 90 S.Ct., raises several constitutional objections to the use of

presumptions. He believes presumptions violate the requirements of the Bill of Rights that the government "state and define specifically what it must prove in order to convict the defendant so that he can intelligently prepare to defend himself on each of the essential elements of the charge." He believes it undermines the defendant's right to trial by an impartial jury by having the trial judge, in effect, tell the jury that Congress has "injected its own views and controls into the guilt-determining, fact-finding process . . . " He further believes they violated the right to counsel by diminishing counsel's ability to effectively perform his role and that they also violate the defendant's rights against self-incrimination.

[7] The views of Justice Black in his dissent are not now the law of the land and legislatures still have the authority to create presumptions where the presumed fact follows beyond a reasonable doubt from the proven fact. If they find them unusable in light of the constitutional problems raised, they still may eliminate the presumed fact from the definition of the crime. Legislative latitude in this respect is essentially the legislature's sense of justice which has been the prime constitutional limitation on the use of the criminal sanction, where an offense has been related to the Bill of Rights' protection. Hart, The Aims of the Criminal Law, 23 Law and Contemporary Problems 401 (1958).

[8] The jury was entitled to find an intent to kill from the fact that the defendant fired at the victims in the first three counts. Although the instruction on the presumption was erroneous, we agree with the Court of Appeals that as to those three counts the mind of the average juror would not have found the prosecutor's case significantly less persuasive had the jury not utilized the statutory presumption as a basis to find in the defendant a specific intent to kill the alleged victims. The error was harmless. *Schneble v. Florida*, 405 U.S. 427, 92 S. Ct. 1056, 31 L.Ed.2d 340 (1972).

The same cannot be said for count 4. There was no

shot fired at the intended victim and although this, in itself, is not determinative, the use of the presumption creates a doubt as to its effect on the jury to the extent we cannot say its use was harmless.

The judgment of the trial court is affirmed as to counts 1, 2 and 3 and reversed and remanded for a new trial as to count 4.

FINLEY, ROSELLINI, HUNTER and WRIGHT, JJ., concur.

STAFFORD, Associate Justice (concurring in part and concurring in the result in part).

I concur in the first three counts. In the fourth count I concur only in the result.

Without question, in a criminal case there must be a "rational connection" between a fact proved and the ultimate fact legislatively presumed. *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); *Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970). I agree with the majority's position that there is no "rational connection" between the fact that one is armed with an unlicensed pistol and an intent to commit a crime of violence. To this extent, then, I agree that the legislatively created presumption must fail and that instruction 25 based thereon was incorrect.

However, the majority appears to hold additionally that in a criminal case the "rational connection" must be proved beyond a reasonable doubt in *all* legislatively created presumptions. Such a holding is both unnecessary for the instant decision and much too sweeping in its scope. Thus, as to the last count, I concur only in the result.

PRACHTENBACH, J., concurs.

HALE, Chief Justice (concurring in part; dissenting in part).

I find it unrational to presume that there exists no rational connection whatever between the possession of a concealed deadly weapon and its use in the com-

mission of a murder. It is a matter of common knowledge that, in most crimes committed with a pistol, the weapon remains concealed either upon the person or in a vehicle or in some close-by place until it is actually employed in the crime. The legislature, therefore was constitutionally entitled to make these assumptions and to legislate upon the basis of them. That the Justices do not see the existence of a rational connection does not mean that the legislature could not see it, nor does it deprive the legislature of the power to presume its existence. Thus, the legislature, I think, was well within its constitutional powers in enacting RCW 9.41.030 to declare that, when a person commits a crime of violence when armed with a pistol, the fact that he was unlicensed to carry it is prima facie evidence that he intended to commit the crime of violence.

The legislature, quite logically, I think, recognizes that there exists a direct rational connection between the carrying of a concealed—*i.e.*, unlicensed—firearm and its use in crimes of violence. But in doing so, this lays down no more than a rebuttable presumption, and the defendant is at liberty to present whatever explanations he may have for carrying a concealed unlicensed pistol immediately prior to using it in the commission of an act of violence. If one does not wish to be saddled with the presumption, he has a ready remedy: not to carry a concealed pistol. By declaring a rebuttable presumption, the statute simply adds to already existing sanctions one more legitimate sanction against the illegal carrying of a deadly weapon.

I would, therefore, affirm on all counts.

HAMILTON, J., concurs.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

4538 3 160

THE STATE OF WASHINGTON,

Petitioner,

v.

GILES S. ODOM,

Respondent.

REMITTITUR

No. 42755

Pierce County No. 39979

C/A 467-II

MAY 20 1974

FILED
IN COUNTY CLERKS OFFICE
A.M. P.M.
MAY 20 1974
PIERCE COUNTY, WASHINGTON
DON PERRY, County Clerk
By DEPUTY

The State of Washington to: The Superior Court of the State of Washington in and for Pierce County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on March 21, 1974, became the final judgment of this court in the above entitled case on May 16, 1974. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

No cost bill having been filed, costs are deemed waived.
The petition for rehearing was denied by order on May 16, 1974.

cc: Honorable Ronald L. Hendry
Mr. Joseph D. Mladinov
Betzendorfer & Deutcher
Mr. Joseph Q. Betzendorfer, Jr.
Sterbick, Manza, Moceri, Gustafson & Narigi
Mr. Richard I. Gustafson
Reporter of Decisions
Clerk, Division II

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 17th day of May, A. D. 1974

WILLIAM M. LOWRY
Clerk of the Supreme Court, State of Washington.

Remittitur, copy of Opinion attached is omitted here.

APPENDIX C

APPENDIX D

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES

Amendment 2

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment 14

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF WASHINGTON

ARTICLE I

Declaration of Rights

§ 24. *Right to Bear Arms.* The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

ARTICLE II

Legislative Department

§ 12. *Sessions, When—Duration.* The first legislature shall meet on the first Wednesday after the first Monday in November, A.D. 1889. The second legislature shall meet on the first Wednesday after the first Monday in January, A.D. 1891, and sessions of the legislature shall be held biennially thereafter, unless specially convened by the governor, but the times of meeting of subsequent sessions may be changed by the legislature. After the first legislature the sessions shall not be more than sixty days.

ARTICLE III

The Executive

§2. *Governor, Term of Office.* The supreme executive power of this state shall be vested in a governor, who shall hold his office for a term of four years, and until his successor is elected and qualified.

§7. *Extra Legislative Sessions.* He may, on extraordinary occasions, convene the legislature by proclamation, in which shall be stated the purposes for which the legislature is convened.

APPENDIX E

STATUTORY PROVISIONS

Revised Code of Washington (RCW)

CHAPTER 9.01

GENERAL PROVISIONS

9.01.080. *Attempt while armed with deadly weapon —Punishment.* Any person who shall attempt to commit a crime punishable as a felony while armed with a pistol, revolver, or deadly weapon, shall, upon conviction be punished as if the crime attempted had been a completed act.

CHAPTER 9.11

Assault

9.11.010. *Assault in the first degree defined—How punished.* Every person who, with intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another—

(1) Shall assault another with a firearm or any deadly weapon or by any force or means likely to produce death; or

(2) Shall administer to or cause to be taken, by another, poison or any other destructive or noxious thing so as to endanger the life of another person, shall be guilty of assault in the first degree and shall be punished by imprisonment in the state penitentiary for not less than five years.

9.11.020. *Assault in the second degree—How punished.* Every person who, under circumstances not amounting to assault in the first degree—

(1) With intent to injure, shall unlawfully administer to or cause to be taken by another, poison or any other destructive or noxious thing, or any drug or medicine the use of which is dangerous to life or health; or

(2) With intent thereby to enable or assist himself or any other person to commit any crime, shall

administer to, or cause to be taken by, another, chloroform, ether, laudanum or any other intoxicating narcotic or anaesthetic; or

(3) Shall wilfully inflict grevious bodily harm upon another with or without a weapon; or

(4) Shall wilfully assault another with a weapon or other instrument or thing likely to produce bodily harm; or

(5) Being armed with a deadly weapon, shall wilfully assault another with a whip; or

(6) Shall assault another with intent to commit a felony, or to prevent or resist the execution of any lawful process or mandate of any court officer, or the lawful apprehension or detention of himself or another person; or

(7) While hunting any game or other animals or birds, shall shoot another;

Shall be guilty of assault in the second degree and be punished by imprisonment in the state penitentiary for not more than ten years or by a fine of not more than one thousand dollars, or by both.

9.11.030. *Assault in the third degree—How punished.* Every person who shall commit an assault or an assault and battery not amounting to assault in either the first or second degrees, shall be guilty of assault in the third degree, and shall be punished as for a gross misdemeanor.

CHAPTER 9.41

Firearms and Dangerous Weapons*

9.41.010. *Terms defined.* "Short Firearm" or "pistol" as used in RCW 9.41.010 through 9.41.160 means any firearm with a barrel less than twelve inches in length.

"Crime of Violence" as used in RCW 9.41.010 through 9.41.160 means any of the following crimes or

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* "This Act may be cited as the Uniform Firearms Act," Laws of 1935, Ch. 172, Sec. 18.

an attempt to commit any of the same: Murder, manslaughter, rape, mayhem, first degree assault, robbery, burglary and kidnapping.

9.41.025. *Committing crime when armed—Penalties — "Inherently dangerous" defined — Resisting arrest.* Any person who shall commit or attempt to commit any felony, or any misdemeanor or gross misdemeanor categorized herein as inherently dangerous, while armed with, or in possession of any firearm, shall upon conviction, in addition to the penalty provided by statute for the crime committed without use or possession of a firearm, be imprisoned as herein provided:

(1) For the first offense the offender shall be guilty of a felony and the court shall impose a sentence of not less than five years, which sentence shall not be suspended or deferred;

(2) For a second offense, or if, in the case of a first conviction of violation of any provision of this section, the offender shall previously have been convicted of violation of the laws of the United States or of any other state, territory or district relating to the use or possession of a firearm while committing or attempting to commit a crime, the offender shall be guilty of a felony and shall be imprisoned for not less than seven and one-half years, which sentence shall not be suspended or deferred;

(3) For a third or subsequent offense, or if the offender shall previously have been convicted two or more times in the aggregate of any violation of the law of the United States or of any other state, territory or district relating to the use of possession of a firearm while committing or attempting to commit a crime, the offender shall be guilty of a felony and shall be imprisoned for not less than fifteen years, which sentence shall not be suspended or deferred;

(4) Misdemeanors or gross misdemeanors categorized as "Inherently Dangerous" as the term is used in this statute means any of the following crimes

or an attempt to commit any of the same: Assault in the third degree, provoking an assault, interfering with a public officer, disturbing a meeting, riot, remaining after warning, obstructing firemen, petit larceny, injury to property, intimidating a public officer, shoplifting, indecent liberties, and soliciting a minor for immoral purposes.

(5) If any person shall resist apprehension or arrest by firing upon a law enforcement officer, such person shall in addition to the penalty provided by statute for resisting arrest, be guilty of a felony and punished by imprisonment for not less than ten years, which sentence shall not be suspended or deferred.

9.41.030. *Being armed prima facie evidence of intent.* In the trial of a person for committing or attempting to commit a crime of violence, the fact that he was armed with a pistol and had no license to carry the same shall be prima facie evidence of his intention to commit said crime of violence.

9.41.040. *Certain persons forbidden to possess arms.* No person who has been convicted in this state or elsewhere of a crime of violence, shall own a pistol or have one in his possession or under his control. Such person upon being convicted of a violation of this section shall be guilty of a felony and punished by imprisonment in the state penitentiary for not less than one year nor more than ten years.

9.41.050. *Carrying pistol.* No person shall carry a pistol in any vehicle unless it is unloaded or carry a pistol concealed on his person, except in his place of abode or fixed place of business, without a license therefor as hereinafter provided.

9.41.060. *Exception.* The provisions of RCW 9.41.050 shall not apply to marshals, sheriffs, prison or jail wardens or their deputies, policemen or other law enforcement officers, or to members of the army, navy or marine corps of the United States or of the national guard or organized reserves when on duty, or to regularly enrolled members of any organization duly authorized to purchase or receive such weapons from

the United States or from this state, or to regularly enrolled members of clubs organized for the purpose of target shooting or modern and antique firearm collecting or to individual hunters: *Provided,* Such members are at, or are going to or from their places of target practice, or their collector's gun shows and exhibits, or are on a hunting, camping or fishing trip, or to officers or employees of the United States duly authorized to carry a concealed pistol, or to any person engaged in the business of manufacturing, repairing, or dealing in firearms or the agent or representative of any such person having in his possession, using, or carrying a pistol in the usual or ordinary course of such business, or to any person while carrying a pistol unloaded and in a secure wrapper from the place of purchase to his home or place of business or to a place of repair or back to his home or place of business or in moving from one place of abode or business to another.

9.41.070. *Issue of licenses to carry.* The judge of a court of record, the chief of police of a municipality, or the sheriff of a county, shall within thirty days after the filing of an application of any person issue a license to such person to carry a pistol concealed on his person within this state for not more than one year from date of issue, for the purposes of protection or while engaged in business, sport or while traveling. Such citizen's constitutional right to bear arms shall not be denied to him, unless there exists a record of his prior court conviction of a crime of violence or of drug addiction or of habitual drunkenness or of confinement to a mental institution. The license shall be in triplicate, in form to be prescribed by the state director of licenses, and shall bear the name, address, description and signature of the licensee and the reason given for desiring a license. The original thereof shall be delivered to the licensee, the duplicate shall within seven days be sent by registered mail to the director of licenses and the triplicate shall be preserved for six years, by the authority issuing said license.

The fee for such license shall be one dollar which shall be paid into the state treasury.

9.41.080. *Delivery to minors and others forbidden.* No person shall deliver a pistol to any person under the age of twenty-one or to one who he has reasonable cause to believe has been convicted of a crime of violence, or is a drug addict, an habitual drunkard, or of unsound mind.

9.41.090. *Sales regulated — Application to purchase — Grounds for denial.* In addition to the other requirements of RCW sections 9.41.010 through 9.41.150 as now or hereinafter amended, no seller shall deliver a pistol to the purchaser thereof until seventy-two hours shall have elapsed from the time of the application for the purchase thereof as provided herein, and, when delivered, said pistol shall be securely wrapped and shall be unloaded.

At the time of applying for the purchase of a pistol the purchaser shall sign in duplicate and deliver to the seller an application containing his full name, address, occupation, place of birth, and the date and hour of the application; and a description of the weapon including the make, model, caliber and manufacturer's number; and a statement that he has never been convicted in this state or elsewhere of a crime of violence, drug addiction or habitual drunkenness, or is legally judged to be of unsound mind. The seller shall, by the end of the business day, sign and attach his address and deliver the original of such application to the chief of police of the municipality or the sheriff of the county of which the seller is a resident. The seller shall deliver the pistol to the purchaser following seventy-two hours thereafter unless the seller is notified in writing by the chief of police of the municipality or the sheriff of the county, whichever is applicable, denying the purchaser's application to purchase and the grounds thereof. The application shall not be denied unless the purchaser has been convicted in this state or elsewhere of a crime of violence, drug addiction, or habitual drunkenness, or is legally judged to be of unsound mind. The chief of police of

the municipality or the county sheriff shall maintain a file containing the original of the application to purchase a pistol.

9.41.093. *Exemptions.* The following shall be exempt from the provisions of section 9.41.090 RCW as now or hereafter amended: sales by wholesalers to dealers; and the sale of antique pistols exempted by the provisions of RCW 9.41.150 as amended.

9.41.095. *Denial of Application—Appeal.* Any person whose application to purchase a pistol as provided in section 9.41.090 as now or hereinafter amended is denied shall have a right to appeal to the legislative body of the municipality or of the county, whichever is applicable, for a review of the denial at a public hearing to be conducted within fifteen days after denial. It shall be the duty of the law enforcement officer recommending the denial to appear at such hearing and to present proof relating to the grounds for denial. In the event that the evidence so presented does not sustain one of the grounds for denial enumerated in RCW 9.41.090, the legislative authority shall authorize the sale.

Any person aggrieved by a determination of the appropriate legislative body not to permit the sale of such weapon is entitled to judicial review by the superior court in the appropriate county.

9.41.100). *Dealers to be licensed.* No retail dealer shall sell or otherwise transfer, or expose for sale or transfer, or have in his possession with intent to sell, or otherwise transfer, any pistol without being licensed as hereinafter provided.

9.41.110. *Dealer's licenses, by whom granted and conditions thereof — Wholesale sales excepted—Permits prohibited.* The duly constituted licensing authorities of any city, town, or political subdivision of this state shall grant licenses in forms prescribed by the director of licenses effective for not more than one year from the date of issue permitting the licensee to sell pistols within this state subject to the following conditions, for breach of any of which the license shall

be forfeited and the licensee subject to punishment as provided in RCW 9.41.010 through 9.41.160.

(1) The business shall be carried on only in the building designated in the license.

(2) The license or a copy thereof, certified by the issuing authority, shall be displayed on the premises where it can easily be read.

(3) No pistol shall be sold (a) in violation of any provisions of RCW 9.41.010 through 9.41.160, nor (b) shall a pistol be sold under any circumstances unless the purchaser is personally known to the seller or shall present clear evidence of his identity.

(4) A true record in triplicate shall be made of every pistol sold, in a book kept for the purpose, the form of which may be prescribed by the director of licenses and shall be personally signed by the purchaser and by the person effecting the sale, each in the presence of the other, and shall contain the date of sale, the caliber, make, model and manufacturer's number of the weapon, the name, address, occupation, and place of birth of the purchaser and a statement signed by the purchaser that he has never been convicted in this state or elsewhere of a crime of violence. One copy shall within six hours be sent by registered mail to the chief of police of the municipality or the sheriff of the county of which the dealer is a resident; the duplicate the dealer shall within seven days send to the director of licenses; the triplicate the dealer shall retain for six years.

(5) This section shall not apply to sales at wholesale.

(6) The dealer's licenses authorized to be issued by this section are general licenses covering all sales by the licensee within the effective period of the license.

(7) Except as provided in RCW 9.41.090 as now or hereinafter amended, every city, town and political subdivision of this state is prohibited from requiring the purchaser to secure a permit to purchase or from requiring the dealer to secure an individual permit for each sale.

The fee paid for issuing said license shall be five dollars which fee shall be paid into the state treasury.

9.41.120. *Certain transfers forbidden.* No person other than a duly licensed dealer shall make any loan secured by a mortgage, deposit or pledge of a pistol. Any licensed dealer receiving a pistol as a deposit or pledge for a loan shall keep such records and make such reports as are provided by law for pawnbrokers and second-hand dealers in cities of the first class. A duly licensed dealer may mortgage any pistol or stock of pistols but shall not deposit or pledge the same with any other person.

9.41.130. *False information forbidden.* No person shall, in purchasing or otherwise securing delivery of a pistol or in applying for a license to carry the same, give false information or offer false evidence of his identity.

9.41.140. *Alteration of identifying marks prohibited.* No person shall change, alter, remove, or obliterate the name of the maker, model, manufacturer's number, or other mark of identification on any pistol. Possession of any pistol upon which any such mark shall have been changed, altered, removed, or obliterated, shall be prima facie evidence that the possessor has changed, altered, removed, or obliterated the same. This shall not apply to replacement barrels in old revolvers, which barrels are produced by current manufacturers and therefore do not have the markings on the barrels of the original manufacturers who are no longer in business.

9.41.150. *Exceptions.* RCW 9.41.010 through 9.41.060 shall not apply to antique pistols and revolvers manufactured prior to 1898 and held as collector's items.

9.41.160. *Penalties.* Any violation of any provision of RCW 9.41.010 through 9.41.150, as amended, other than those violations specified in sections 2 and 3 of this amendatory act, shall be a misdemeanor and punishable accordingly.

9.41.170. *Alien's license to carry firearms—Excep-*

tion. It shall be unlawful for any person who is not a citizen of the United States, or who has not declared his intention to become a citizen of the United States, to carry or have in his possession at any time any shotgun, rifle, or other firearm, without first having obtained a license from the director of motor vehicles, and such license is not to be issued by the director of motor vehicles except upon the certificate of the consul domiciled in the state and representing the country of such alien, that he is a responsible person and upon the payment for the license of the sum of fifteen dollars: *Provided,* That this section shall not apply to Canadian citizens resident in a province which has an enactment or public policy providing substantially similar privilege to residents of the state of Washington and who are carrying or possessing weapons for the purpose of using them in the hunting of game while such persons are in the act of hunting, or while on a hunting trip, or while such persons are competing in a bona fide trap or skeet shoot or any other organized contest where rifles, pistols, or shotguns are used as to weapons used in such contest. Nothing in this section shall be construed as to aliens to hunt or fish in this state without first having obtained a regular hunting or fishing license. Any person violating the provisions of this section shall be guilty of a misdemeanor.

91.41.180. *Setting spring gun.* Every person who shall set a so-called trap, spring pistol, rifle, or other deadly weapon, shall be punished as follows:

(1) If no injury result therefrom to any human being, by imprisonment in the county jail for not more than one year or by a fine of not more than one thousand dollars, or by both.

(2) If injuries not fatal result therefrom to any human being, by imprisonment in the state penitentiary for not more than twenty years.

(3) If the death of a human being results therefrom, by imprisonment in the state penitentiary for not more than twenty years.

9.41.185. *Coyote getters.* The use of "coyote getters" or similar spring triggered shell devices shall not constitute a violation of any of the laws of the state of Washington when the use of such "coyote getters" is authorized by the state department of agriculture and/or the state department of game in cooperative programs with the United States Fish and Wildlife Service, for the purpose of controlling or eliminating coyotes harmful to livestock and game animals on range land or forest areas.

9.41.190. *Machine guns prohibited.* That it shall be unlawful for any person to manufacture, own, buy sell, loan, furnish, transport, or have in possession, or under control, any machine gun, or any part thereof capable of use or assembling or repairing any machine gun: *Provided however,* That such limitation shall not apply to any peace officer in the discharge of official duty, or to any officer or member of the armed forces of the United States or the state of Washington.

9.41.200. *Machine gun defined.* For the purpose of RCW 9.41.190 through 9.41.220 a machine gun is defined as any firearm or weapon known as a machine gun, mechanical rifle, submachine gun and/or any other weapon, mechanism, or instrument not requiring that the trigger be pressed for each shot and having a reservoir clip, disc, drum, belt, or other separable mechanical device for storing, carrying, or supplying ammunition which can be loaded into such weapon, mechanism, or instrument and fired therefrom at the rate of five or more shots per second.

9.41.210. *Penalty.* Any person violating any of the provisions of RCW 9.41.190 through 9.41.220 shall be guilty of a felony.

9.41.220. *Machine guns and parts contraband.* All machine guns, or parts thereof, illegally held or possessed are hereby declared to be contraband, and it shall be the duty of all peace officers, and/or any officer or member of the armed forces of the United States or the state of Washington, to seize said ma-

chine gun, or parts thereof, wherever and whenever found.

9.41.230. *Aiming or discharging firearms.* Every person who shall aim any gun, pistol, revolver or other firearm, whether loaded or not, at or towards any human being, or who shall wilfully discharge any firearm, air gun or other weapon, or throw any deadly missile in a public place, or in any place where any person might be endangered thereby, although no injury result, shall be guilty of a misdemeanor.

9.41.240. *Use of firearms by minor.* No minor under the age of fourteen years shall handle or have in his possession or under his control, except when accompanied by or under the immediate charge of his parent or guardian, any firearm of any kind for hunting or target practice or for other purposes. Every person violating any of the foregoing provisions, or aiding or knowingly permitting any such minor to violate the same, shall be guilty of a misdemeanor.

9.41.250. *Dangerous Weapons — Evidence.* Every person who shall manufacture, sell or dispose of or have in his possession any instrument or weapon of the kind usually known as slung shot, sand club, or metal knuckles, or spring blade knife, or any knife the blade of which is automatically released by a spring mechanism or other mechanical device, or any knife having a blade which opens, or falls, or is ejected into position by the force of gravity, or by an outward, downward, or centrifugal thrust or movement; who shall furtively carry with intent to conceal any dagger, dirk, pistol, or other dangerous weapon; or who shall use any contrivance or device for suppressing the noise of any firearm, shall be guilty of a gross misdemeanor.

9.41.260. *Dangerous exhibitions.* Every proprietor, lessee or occupant of any place of amusement, or any plat of ground or building, who shall allow it to be used for the exhibition of skill in throwing any sharp instrument or in shooting any bow gun, pistol or firearm of any description, at or toward any human being, shall be guilty of a misdemeanor.

9.41.270. *Weapons apparently capable of producing bodily harm, carrying, exhibiting, displaying or drawing unlawful — Penalty — Exceptions.* (1) It shall be unlawful for anyone to carry, exhibit, display or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

(2) Any person violating the provisions of subsection (1) above shall be guilty of a gross misdemeanor.

(3) Subsection (1) of this section shall not apply to or affect the following:

(a) Any act committed by a person while in his place of abode or fixed place of business;

(b) Any person who by virtue of his office or public employment is vested by law with a duty to preserve public safety, maintain public order, or to make arrests for offenses, while in the performance of such duty;

(c) Any person acting for the purpose of protecting himself against the use of presently threatened unlawful force by another, or for the purpose of protecting another against the use of such unlawful force by a third person;

(d) Any person making or assisting in making a lawful arrest for the commission of a felony; or

(e) Any person engaged in military activities sponsored by the federal or state governments.

CHAPTER 9.95

Prison Terms, Paroles and Probations

9.95.015. *Finding of fact or special verdict establishing defendant armed with deadly weapon.* In ev-

ery criminal case wherein conviction would require the board of prison terms and paroles to determine the duration of confinement and wherein there has been an allegation and evidence establishing that the accused was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused was armed with a deadly weapon, as defined by RCW 9.95.040, at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find the defendant guilty, also find a special verdict as to whether or not the defendant was armed with a deadly weapon, as defined in RCW 9.95.040, at the time of the commission of the crime.

9.95.040. *Board to fix duration of confinement — Minimum terms prescribed for certain cases.* Within six months after the admission of a convicted person to the penitentiary, reformatory, or such other state penal institution as may hereafter be established, the board of prison terms and paroles shall fix the duration of his confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense of which he was convicted or the maximum fixed by the court where the law does not provide for a maximum term.

The following limitations are placed on the board of prison terms and paroles with regard to fixing the duration of confinement in certain cases, notwithstanding any provisions of law specifying a lesser sentence, to-wit:

(1) For a person not previously convicted of a felony but armed with a deadly weapon at the time of the commission of his offense, the duration of confinement shall not be fixed at less than five years.

(2) For a person previously convicted of a felony either in this state or elsewhere and who was armed with a deadly weapon at the time of the commission of his offense, the duration of confinement shall not be fixed at less than seven and one-half years.

The words "deadly weapon", as used in this section include, but are not limited to, any instrument known as a blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

(3) For a person convicted of being an habitual criminal within the meaning of the statute which provides for mandatory life imprisonment for such habitual criminals, the duration of confinement shall not be fixed at less than fifteen years. The board shall retain jurisdiction over such convicted person throughout his natural life unless the governor by appropriate executive action orders otherwise.

(4) Any person convicted of embezzling funds from any institution of public deposit of which he was an officer or stockholder, the duration of confinement shall be fixed at not less than five years.

Except when an inmate of the reformatory, penitentiary or such other penal institution as may hereafter be established, has been convicted of murder in the first or second degree, the board may parole an inmate prior to the expiration of a mandatory minimum term, provided such inmate has demonstrated a meritorious effort in rehabilitation and at least four board members concur in such action: *Provided*, That any inmate who has a mandatory minimum term and is paroled prior to the expiration of such term according to the provisions of this chapter shall not receive a conditional release from supervision while on parole until after the mandatory minimum term has expired.

APPENDIX F

(Extracts of Instructions to Jury by Trial Court)

INSTRUCTION NO. 1

MEMBERS OF THE JURY:

This is a criminal action in which the State of Washington is Plaintiff and Giles S. Odom is the defendant. The State by the Prosecuting Attorney of Pierce County, Washington, has charged the defendant with the crime of Assault in the First Degree by an Information filed herein, the charging part of which is as follows:

That the said Giles S. Odom, in the County of Pierce, in the State of Washington, on or about the 24th day of November, 1970, did then and there being unlawfully and feloniously with intent to kill Oscar Oltman, did assault the said Oscar Oltman with a firearm and deadly weapon likely to produce death, to-wit: a pistol, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Washington.

COUNT IV

And for a Fourth Count and further cause of action, the same being a part of the same transaction and being of the same class of crime as that set forth in Counts I, II and III hereof, comes now RONALD L. HENDRY, Prosecuting Attorney in and for the County of Pierce, State of Washington, and by this information accuses GILES S. ODOM of the crime of ASSAULT IN THE FIRST DEGREE, committed as follows, to-wit: That the said GILES S. ODOM, in the County of Pierce, in the State of Washington, on or about the 24th day of November, 1970, did then and there being unlawfully and feloniously with intent to kill Grenville C. Legge, did assault the said Grenville C. Legge, with a firearm and deadly weapon likely to produce death, to-wit: a pistol, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Washington.

INSTRUCTION NO. 3

To this information and the charge thereby made, the defendant has entered a plea of not guilty. This plea of not guilty raises every issue in the trial and it therefore becomes incumbent upon the State to prove to your satisfaction beyond a reasonable doubt every material element of the charge presented by this information and with which the accused stands charged.

INSTRUCTION NO. 4

You are instructed that the law presumes the defendant to be innocent until he is proven guilty beyond a reasonable doubt.

This presumption of innocence is not a matter of form which you may disregard at pleasure, but it is a part of the law of the land and is a substantial right guaranteed by that law to every person accused of crime, and it is your duty in this case to bear this rule of law in mind in considering the question of the defendant's guilt or innocence. This presumption continues with the defendant throughout all stages of the trial until the case has been finally submitted to you and you have found that such presumption has been overcome by the evidence in the case beyond a reasonable doubt. The defendant should be given the benefit of every reasonable doubt.

INSTRUCTION NO. 5

By the term "reasonable doubt" is meant as the term implies, a doubt based upon reason and such a doubt arising either from the evidence or lack of evidence as a reasonable man would entertain. A doubt to be reasonable must be such a doubt as an honest, fair minded man might, with reason, entertain consistently with a desire to ascertain the truth. A doubt which is fanciful, imaginary, a vague conjecture, a mere whim, or a groundless surmise, is not a reasonable doubt. A doubt to justify acquittal must arise from a candid and impartial consideration of all the evidence

INSTRUCTION NO. 6.

You are instructed that each count in said informa-

tion is charged as a separate and distinct offense and you must determine the guilt of the defendant as to each count.

If you find that each of the elements of the particular offense have been established beyond a reasonable doubt in the particular count under consideration, then you should return a verdict of guilty of the crime charged in that count; on the other hand, if you find that the State has failed to prove any one of such elements beyond a reasonable doubt as to the defendant on a particular count, then you should find the defendant not guilty as to that count.

INSTRUCTION NO. 10

If you find from the evidence beyond a reasonable doubt all of the following alleged facts, to-wit:

1. That in Pierce County, Washington;

2. That on or about the 24th day of November, 1970;

3. That the defendant, GILES S. ODOM, did assault Grenville C. Legge with a deadly weapon;

4. That such assault was committed with intent to kill;

Then you must find the defendant, GILES S. ODOM, guilty of ASSAULT IN THE FIRST DEGREE, as charged in Count IV of the Information.

INSTRUCTION NO. 12

While the defendant in this case is charged with Assault in the First Degree only, this charge also includes and embraces within it, Assault in the Second Degree as fully as though each of said offenses were separately stated and charged in the information and upon the trial of this case, the State is entitled to prove either Assault in the First Degree or Assault in the Second Degree, but in order to convict the defendant of either of said offenses each and every material element of the particular offense upon which conviction is sought must be proved beyond a reasonable doubt before you will be justified in convicting the defendant of any such offense.

INSTRUCTION NO. 13

If a person willfully assaults another with a weapon or other instrument or thing likely to produce bodily harm, he is guilty of the crime of assault in the second degree whether or not he entertained a design or intent to cause such bodily harm. The gist of the offense is the willful — in the sense of intentional and not accidental — attack with a weapon which might cause such harm, and whether the attacker foresaw, intended, or thought of the harm which might result is not relevant in the issue of guilt or innocence.

INSTRUCTION NO. 17

You are further instructed that every person who, under circumstances not amounting to assault in the first degree, shall wilfully assault another with a weapon or other instrument or thing likely to produce bodily harm, shall be guilty of Assault in the Second Degree.

Therefore, if you find from the evidence, beyond a reasonable doubt the following facts, to-wit:

1. That the defendant, GILES S. ODOM, under circumstances not amounting to assault in the first degree, wilfully assaulted Grenville C. Legge with a deadly weapon likely to produce bodily harm; and

2. That such act occurred on or about the 24th day of November, 1970, in the County of Pierce, State of Washington;

Then you must find the defendant, GILES S. ODOM, guilty of ASSAULT IN THE SECOND DEGREE.

INSTRUCTION NO. 19

You are instructed that if a person commits a wanton, reckless, illegal and dangerous act that may result in injury to any one of a number of innocent bystanders, he can be guilty of assault even though he had no specific intent to injure any particular person.

INSTRUCTION NO. 20

An assault is an attempt to use force unlawfully or

inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented. There must be some power, actual, or apparent, of doing bodily harm, but apparent power is sufficient, and one who menacingly points at another an apparently loaded gun commits an assault with a weapon likely to produce bodily harm, even though actually the gun was not loaded or not fired, or, if fired, was not aimed at the person assaulted at the actual time of firing.

INSTRUCTION NO. 21

If the defendant's guilt is shown and there is a reasonable doubt as to which one of the degrees of the offense he is guilty, he can be convicted of that degree and that description of the crime about which, under the circumstances, such reasonable doubt does not exist.

INSTRUCTION NO. 22

"Wilfully" means purposely and intentionally, but not accidentally, and without and beyond the authority of the law.

INSTRUCTION NO. 23

The intent with which an act is done is a mental process and as such generally remains hidden within the mind where it is conceived and is rarely, if ever, susceptible of proof by direct evidence, but must be inferred or gathered from outward manifestations by the words or acts of the party entertaining them, and the facts or circumstances surrounding or attendant upon the act with which it is charged to be connected.

INSTRUCTION NO. 24

The Court instructs the jury that the law presumes that every man intends the natural and probable consequences of his own act. It is not necessary to establish intent by direct and positive evidence but intent may be established by inference and in the same way as any other fact by taking in consideration the acts of the parties and all the facts and circumstances of the case.

INSTRUCTION NO. 25

You are instructed that under the laws of the State of Washington no person shall carry a pistol concealed on or about his person, except in his place of abode or place of business, without a license therefor.

You are further instructed that in the trial of a person who has been charged with a crime of violence, the fact that the defendant was armed with a pistol and had no license to carry the same shall be prima facie evidence of his intention to commit such crime of violence.

"Prima facie evidence" means evidence which may be accepted for proof of a particular fact. Such evidence even if not refuted by the defendant, should be given just such weight as it seems to you to merit.

INSTRUCTION NO. 30

In determining the issues in this case you should take into careful consideration the entire evidence admitted by the Court for your consideration, by giving the several parts of the evidence such weight and effect as you think the same entitled to.

You are instructed to disregard all statements of counsel on either side, unless the same are supported by the evidence; nor are you to draw any conclusions or inferences from questions propounded by counsel and ruled out by the Court, nor from offers of testimony which have by the Court been rejected; and if any evidence has been stricken out by the Court, you are not to consider it; but you will base your opinions and conclusions herein as to the guilt or innocence of the defendant exclusively upon the evidence that has been admitted by the Court for your consideration and the law as given to you by the Court.

INSTRUCTION NO. 31

The Court can have no opinion on the facts of the case and whatever the Court may have said during the trial of this case in ruling upon motions, objections, or matters before the Court, or in these instructions must not be taken by you as any opinion or in-

timation on the part of the Court as to the facts in the case or as expressing any opinions of the Court thereon, for nothing of that kind is intended.

The Court's responsibility is with the law, and yours with the facts, of which you are the sole and exclusive judges. Take the law as given to you by the Court — and by this law you are bound — apply it to the facts as found by you from the whole evidence in the case and thereupon make up your verdict.

INSTRUCTION NO. 32

You are the sole and exclusive judges of the evidence and of the credibility of the several witnesses and of the weight to be attached to the testimony of each. In weighing the testimony of a witness, you have a right to consider his demeanor upon the witness stand, the apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness relates, and the interest, if any, you may believe a witness feels in the result of the trial, and any other fact or circumstance arising from the evidence which appeals to your judgment as in any wise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to.

You will be slow to believe that any witness has testified falsely in the case, but if you do believe that any witness has wilfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely, except in so far as the same may be corroborated by other credible evidence in the case.

INSTRUCTION NO. 33

Any fact or issue may be proved either by direct or by circumstantial evidence. Both classes of proof are equally competent and legal. The only difference between them is that direct evidence is produced by witnesses testifying directly from their personal observation, while circumstantial evidence is proof of cer-

tain facts and circumstances from which the jury may infer the existence of other facts which according to the common experience of mankind, usually and reasonably accompany the facts proven.

A conclusion based upon direct evidence depends upon your belief in the truthfulness and accuracy of observation of the witness testifying to the fact observed.

A conclusion based upon circumstantial evidence depends upon your belief as to whether such a conclusion reasonably results or is naturally inferable from the physical facts and other circumstances that have been proven. The facts and circumstances relied upon must be consistent with each other, and with the guilt of the defendant. They must be inconsistent with any reasonable theory of innocence. They must be of such character as to exclude every reasonable hypothesis other than that of guilt.

INSTRUCTION NO. 34

The court has allowed in this case the introduction of evidence known as expert testimony, and has allowed expert witnesses to testify herein. You are instructed that you are not bound by the testimony of such witnesses, but that you are to consider such testimony in connection with all other facts in evidence, and that you are to give to such testimony such weight and credit as you shall deem it entitled, taking into consideration the knowledge, skill and intelligence of such expert witnesses as disclosed in their testimony and by all the facts and circumstances shown and developed in their testimony. The value of opinion testimony is in all cases a question to be determined by the jury, and it is the duty of the jury to determine its verdict herein and upon a consideration of all the evidence before them.

INSTRUCTION NO. 35

Under the law of this State, the fact that a defendant has previously been convicted of a crime is not of itself any evidence of his guilt in this case. It is, however, a circumstance which may be weighed and

considered by you in the determination of what weight or credibility should be allowed his testimony as a witness in this case.

INSTRUCTION NO. 36

Evidence of the defendant's character as to those traits which ordinarily would be involved in the commission of a crime such as those charged in this case is relevant to the question of the defendant's guilt or innocence because it may be reasoned that a person of good character as to such traits would not be likely to commit the crimes of which the defendant is charged.

Evidence of good character may be sufficient to raise a reasonable doubt whether the defendant is guilty, which doubt should otherwise not exist.

INSTRUCTION NO. 37

In making up your verdict you are not to consider what punishment might be inflicted upon the defendant, or what disposition of the defendant might be made by the Court should you find the defendant guilty, as that is a matter for the Court to determine under the law. The question you have to determine is simply a question of fact. Your province and your duty is to consider the evidence adduced in this case and then determine as to the guilt or innocence of the defendant of the crime with which he stands charged by the information.

INSTRUCTION NO. 38

The words "deadly weapon" as used in these instructions shall include, but are not limited to any instrument known as a pistol, revolver, or any other firearm.

INSTRUCTION NO. 45

If you find the defendant guilty of Assault in the First Degree as charged in Count IV of the Information, then you will be required to make a Special Finding of Fact and Special Verdict as follows:

Was the defendant armed with a deadly weapon at

the time of the commission of his offense? Yes..... No.....

INSTRUCTION NO. 46

If you find the defendant guilty of Assault in the Second Degree in Count IV of the Information, then you will be required to make a Special Finding of Fact and Special Verdict as follows:

Was the defendant armed with a deadly weapon at the time of the commission of his offense? Yes..... No.....

INSTRUCTION NO. 50

This being a criminal case, it will require the agreement of your entire number of twelve to return a verdict.

In retiring to deliberate upon your verdict, you will select one of your number to act as foreman, whose duty it will be to sign whatever verdict you agree upon.

You will take to the jury room these instructions and forms of verdict which have been prepared for your convenience. You are to return your verdict on the particular form which accords with your conclusion in this case.

You will now listen to the argument of counsel.

(Signed: ROBERT A. JACQUES, Judge.)